(3)

No. 85-392

Supreme Court, U.S.
FILED
JAN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SECURITIES INDUSTRY ASSOCIATION,

Petitioner,

—v.—

COMPTROLLER OF THE CURRENCY, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:

William J. Fitzpatrick
Senior Vice President and
General Counsel
Securities Industry Association
120 Broadway
New York, New York 10271

Donald J. Crawford
Senior Vice President and Director
of Government Relations
Securities Industry Association
1111 Nineteenth Street, N.W.
Washington, D.C. 20036

James B. Weidner
(*Counsel of Record*)
David A. Schulz
Mark Holland
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8000
Attorneys for Petitioner
Securities Industry Association

BEST AVAILABLE COPY

5p

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-392

SECURITIES INDUSTRY ASSOCIATION,

Petitioner,

—v.—

COMPTROLLER OF THE CURRENCY, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The brief in opposition (a) is premised on a contention in direct conflict with the teaching of this Court and (b) provides no answer at all to the real issue now presented. It confirms that the SIA's petition should be granted.[1]

(a) Respondent argues that Congress intended Section 16 of the Glass-Steagall Act to sanction public stock brokering for banks. The premise underlying this entire argument is that any narrower interpretation would be irreconcilable with the 1933 Senate Report stating that Section 16 was intended to permit banks "to purchase and sell investment securities for their

---

1 The opposing brief was filed by the Federal respondent only. Respondent Security Pacific National Bank has not filed a brief in opposition.

customers to the same extent as heretofore." Opp. Br. at 9-10. This Court, however, has already instructed the contrary. Interpreting the same "heretofore" language in *Schwab*, the Court did *not* conclude that Congress had intended Section 16 to sanction banks' brokering securities for the general public. The Court determined instead that Congress had intended the section merely to endorse the "traditional banking service" through which banks "arranged the purchase and sale of securities as an accommodation to their customers"[2]—a limitation far more restrictive than that postulated by the court below. As the Comptroller himself recently recognized in parallel proceedings, "[t]here is . . . little doubt that *discount brokerage is not a traditional banking service*."[3]

(b) The issue that remains is whether, given this very limited Congressional intent, Section 16 may nevertheless be administratively expanded, as here, to sanction stock brokerage for the general public. The Court expressly did not reach this issue in *Schwab*,[4] and respondent now essentially avoids it. The Comptroller's new ruling in this respect is directly contrary to the view consistently expressed by his Office over the previous five decades—that bank securities brokerage was to be confined strictly to *bona fide* banking customers. (SIA Pet. at 9-11.)

Such a reversal, alone, raises an important issue,[5] but the question now presented is even more fundamental. Respondent

---

2 *Securities Industry Ass'n* v. *Board of Governors*, 104 S. Ct. 3003, 3008, n.13 and accompanying text (1984).

3 Comptroller's Petition for a Writ of Certiorari at 19, *Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Dec. 9, 1985) (emphasis supplied).

4 As explained there, the Court had "no occasion to determine whether § 16 would permit banks to engage in brokerage activity on behalf of the general public as well as for their own customers." 104 S. Ct. at 3011, n. 20.

5 *See* SIA Pet. at 7-8. Contrary to the decision below, the weight accorded to administrative reversals typically should be very little. *Watt* v. *Alaska*, 450 U.S. 259, 273 (1981). Indeed, this Court has

does not, and cannot, dispute that the Comptroller had repeatedly expressed his original, long-held interpretation of Section 16 during the 1934-35 hearings in which he successfully urged Congress to amend that section to read as it now does.[6] The amendment then accepted by Congress thus reflects an interpretation of Section 16 the *reverse* of that affirmed below.

The affront to Congressional policy by the present ruling is particularly egregious. It would be anomalous indeed if the law condoned an administrator's first convincing Congress to loosen the restrictions of a statutory prohibition, because the regulated institutions were otherwise strictly limited by statute, and then, after the prohibition is relaxed, doing an administrative about-face to announce—with no further Congressional action—that the other limitation was never really in the statute at all. That, however, is just the result sanctioned here.

---

instructed that when, as here, administrators had made their views known to Congress in committee hearings, a court should resolve any ambiguity in favor of that contemporaneous administrative construction where it furthers the underlying legislative purpose. *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969). And, while the respondent now argues that the Comptroller's complete change of position was gradual (Opp. Br. at 10-11), in fact it was not. The Comptroller's 1974 letter (*id.*), for example, concerned only whether banks could charge a fee for their service and had nothing to do with the broader issue of whether banks could offer the service generally to the public.

6 By that amendment, Congress accepted the Comptroller's request to relax the restrictions of Section 16 in order to permit accommodation of orders from bank customers for stock as well as investment securities, to which the statute originally had been limited. *See* SIA Pet. at 9-10. Regarded as a mere "technical" amendment, that is the *only* time in the history of this country national banks have been authorized to deal in any way with speculative securities.

As the Securities and Exchange Commission recently confirmed, Congress' understanding of the tightly limited accommodation services permitted to banks also led to the exclusion of banks from the broker-dealer registration requirements of the Securities Exchange Act of 1934. *See* SIA Pet. at 14. The SEC's recent rule, requiring banks that have now begun publicly to solicit brokerage business to register as broker-dealers, 12 C.F.R. § 240.3b-9, was recently upheld. *American Bankers Ass'n* v. *SEC*, No. 85-2482, slip op. (D.D.C. Oct. 31, 1985), *appeal docketed*, No. 85-6055 (D.C. Cir. Oct. 31, 1985).

Absent action by this Court, the decision below will stand as an ominous precedent for regulation of the financial services industries in this country.[7] For each of the reasons set forth above and in the SIA's Petition, this Court should issue the requested Writ of Certiorari.

Dated: January 6, 1986
New York, New York

Respectfully submitted,

James B. Weidner
(*Counsel of Record*)
David A. Schulz
Mark Holland
ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8000
Attorneys for Petitioner
Securities Industry Association

Of Counsel:

William J. Fitzpatrick
Senior Vice President and
General Counsel
Securities Industry Association
120 Broadway
New York, New York 10271
(212) 608-1500

Donald J. Crawford
Senior Vice President and Director
of Government Relations
Securities Industry Association
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 296-9410

---

7 The Comptroller has not, nor could he, question the nationwide applicability of the present ruling. Indeed, the Comptroller has said he is currently considering applications from 60 national banks to engage in public discount brokerage. Petition for a Writ of Certiorari at 9, *Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Dec. 9, 1985).